

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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DEC 29 2004
Federal Communications Commission
Bureau / Office

In the Matter of:)

Petition for Rulemaking)
Amendment of §73.622(b))
DTV Table of Allotments)
(Booneville, Mississippi))

Facility ID No. 43170

RECEIVED

TO: The Chief, Media Bureau

MAY 16 2005

Federal Communications Commission
Office of the Secretary

PETITION TO DISMISS AS MOOT

I. Preliminary Statement

1. In light of the issuance of the Commission's *Report and Order in the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, (FCC 04-192), released August 4, 2004 ("*Channel Election and Repacking Order*"), it is imperative that the following information be brought to the Commission's attention to avoid missing a very short window of opportunity that exists before the actual channel election process begins, and the opportunity to have Channel 8 allotted to Tupelo, Mississippi, vanishes. There was filed with the Commission on February 2, 2000, on behalf of Mississippi Authority for Educational Television ("MAET"), licensee of Noncommercial Television Station WMAE-TV, Channel 12, Booneville, Mississippi, a Petition for Rulemaking requesting the amendment of the DTV Table of Allotments by substituting DTV Channel 8 for WMAE-TV's allotted DTV Channel 55 at Booneville Mississippi. That petition

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remains pending at this time. There is also pending before the Commission a "Petition for Reconsideration," filed on behalf of WTVA, Inc. ("WTVA"), licensee of Television Broadcast Station WTVA, NTSC Channel 9, and permittee of WTVA-DT, Channel 57, Tupelo-Columbus, Mississippi. The WTVA petition seeks reconsideration of a Commission action of February 28, 2002, dismissing WTVA's "Petition for Rulemaking" which proposed to amend the DTV Table of Allotments by substituting DTV Channel 8 for the allotted DTV Channel 57 at Tupelo, Mississippi. That submission by WTVA has spawned a series of procedurally convoluted events that now serve as a stumbling block to the introduction of new DTV service in the Tupelo-Columbus-West Point Television Market. In essence, the WTVA and MAET proposals are mutually-exclusive.

2. On March 7, 2003, more than one (1) year after WTVA submitted its "Petition for Reconsideration," and prior to the issuance of a Commission *Public Notice* listing WTVA's "Petition for Reconsideration" as having been filed—which event would have triggered the date for the filing of oppositions thereto—MAET filed an admittedly premature opposition.¹ That submission has been followed by several others filed on behalf of both WTVA and WMAE-TV.² With the issuance of the Commission's *Channel Election and Repacking Order*, the arguments set forth in the aforementioned

¹ See, MAET's "Opposition to Petition for Reconsideration," page 1, footnote 1.

² In addition to the aforementioned "Petition for Reconsideration," MAET also filed on the same day, a "Motion to Dismiss," relative to the pending application of WTVA. On March 20, 2003, WTVA submitted a "Motion for Extension of Time" to respond to each of MAET's unauthorized pleadings. Accordingly, out of an abundance of caution, WTVA filed on April 9, 2003 its "Reply to Opposition to Petition for Reconsideration" and an "Opposition to Motion to Dismiss." On June 4, 2003, MAET filed a "Motion to Strike" WTVA's reply, and an "Informal Objection to Amendment" relative to a WTVA engineering submission. On June 18, 2003, WTVA responded thereto by filing both an "Opposition to Motion to Strike," and an "Opposition to Informal Objection to Amendment."

pleadings may become moot. Regardless, there is significant information—previously not brought to the Commission’s attention in the context of this or any other proceeding, which needs to be scrutinized at this time.

**II. DTV Channel Eight Should be Substituted
in lieu of WTVA’s Allotted Channel 57 at Tupelo**

3. An examination of the Minutes of a Regular Meeting of the Board of Directors of MAET, held on March 11, 2003, and as posted on MAET’s website is very revealing.³ During a discussion over negotiations with WTVA concerning the allotment of Channel 8 to Tupelo vs. Booneville, Marie Antoon, Executive Director of MAET, commented on the planned future use of Channel 8. The minutes recite: “Marie Antoon noted that the importance of obtaining digital Channel 55 vs. Channel 8 will result in lower operational costs and better coverage.” Indeed, not only was Channel 55 the channel allotted to WMAE-DT in the Commission’s DTV Table of Allotments,⁴ but MAET’s leadership had made a determination that it would be advantageous to MAET—both in terms of cost and coverage—to operate on its allotted Channel 55, rather than Channel 8, the channel for which MAET had filed a request to have substituted for Channel 55.

4. In connection with its intent to pursue the already allotted Channel 55, rather than continue the pursuit of Channel 8 as a substitute, MAET filed with the Commission on February 4, 2004, a Request for Special Temporary Authority (“STA”) to commence operations on Channel 55 with reduced power. That request for STA was granted on February 17, 2004,⁵ and has since been extended until February 18, 2005. WMAE-DT’s

³ See, Attachment A hereto.

⁴ *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Order*, 14 FCC 1348 Appendix B (1998). (“*Second Memorandum Opinion and Order*”)

⁵ See, Attachment B, hereto.

STA operations on Channel 55 continue to this time. However, despite its stated intent to operate on Channel 55, followed by its actual commencement on Channel 55, MAET has never supplemented its pending “Petition for Rulemaking” to substitute DTV Channel 8 for Channel 55—or its premature Opposition to WTVA’s Petition for Reconsideration—to reflect the fact that it had proceeded with construction of its DTV facilities on Channel 55, and obviously has abandoned its plans to pursue DTV Channel 8. With the withdrawal of MAET’s petition for rulemaking, which petition is now seemingly moot, nothing stands in the way of the Commission granting WTVA’s reconsideration request.⁶ WMAE-DT must vacate Channel 55 as part of the Commission’s band-clearing scheme,⁷ and presumably will, at that time, revert to operations on Channel 12. In any case, MAET has not disclosed its intentions.

5. If, as indicated, MAET has abandoned its interest in pursuing DTV Channel 8, then it should so advise the Commission. In such case, MAET’s failure to dismiss its petition and withdraw its unauthorized Opposition to WTVA’s proposal, is tantamount to a disregard of §1.65 the spirit and intent of the Commission’s Rules.⁸ Section 1.65 states in pertinent part:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant

⁶ An engineering problem was resolved with the submission of additional engineering material and a “DTV Interference Agreement” submitted by WTVA on April 9, 2003, as part of its “Reply to Opposition to Petition for Reconsideration.”

⁷ See *Channel Election and Repacking Order*, at ¶95.

⁸ 47 CFR §1.65.

respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate . . .

Admittedly, while this provision clearly applies to “applicants,” it does not specify petitioners or objectors in a non-application Commission proceeding. However, while the issue arose 30 years ago within the context of numerous pleadings being filed at that time in the Cable Television area, the Commission released an *Order*⁹ which, had they thought of it at the time, should have resulted in the amendment of §1.65, not just Parts 76 and 78 of the Commission’s Rules. The *Order* stated in pertinent part:

It has come to our attention that some applicants, petitioners or other parties to Cable Television proceedings pending before the Commission have failed to keep the Commission informed on substantial and significant changes in matters relating to their pleadings. All parties need to be aware of their continuing obligation to update their pleadings . . .

* * *

... As required by §1.65, we expect *petitioners, applicants, those who comment and those who object* to take the initiative in keeping their filings current, accurate and complete. (*Emphasis added*).

Even though raised in the context of amending the Cable TV rules, the language cited imparts a more general mandate of a “continuing obligation to update . . . [all] pleadings” applicable to all petitioners. So too, it is obligatory for MAET to supplement the record

⁹ See *Order*, 47 F.C.C.2d 182 (1974).

by furnishing updated information in connection with its petition and its opposition to WTVA's Petition for Reconsideration, with respect to whether it has abandoned its efforts for Channel 8, at Booneville, Mississippi.

6. In an analysis of the online minutes of regular MAET Board of Directors' meetings, WTVA has encountered no indication of any discussion of an intent to pursue Channel 8 for WMAE-DT, nor has it noted any mention of an allocation or request for funding to construct DTV facilities for WMAE-DT on Channel 8. At this point in time, WTVA must question the sincerity of MAET's maintaining on file its Petition for Rulemaking and its Opposition to the WTVA Petition for Reconsideration. By so doing, MAET—no doubt unintentionally—has created a situation which *might* be viewed by some, much like a strike petition, with the only purpose being to impede WTVA's efforts.

III. MAET Position Lacks Merit

7. Even if MAET were to come forward at this time and express an intent to continue its quest for Channel 8, on a comparative basis, there is no question but that the channel should be assigned to WTVA for use at Tupelo. WMAE-TV is licensed to MAET, a state agency that encompasses a network of commercial-free radio and television stations. In fact, WMAE-DT is nothing more than a 100% "satellite" TV station which obtains all of its programming simply by rebroadcasting the signal of its "parent" station, WMPN-TV, Jackson, Mississippi.¹⁰ WMAE-DT has no main studio at or near Booneville, Mississippi, and Jackson—from where all of its programming

¹⁰ "TV satellite stations are full power terrestrial broadcast stations authorized under Part 73 of the Commission's Rules to retransmit all or part of the programming of a parent station that is ordinarily commonly owned. . . . A station that obtains and rebroadcasts all of its programming from its parent is referred to as a "100% satellite" station . . ." See, *Report and Order*, 6 FCC Rcd 4212, ¶3 (1991).

originates—is located more than 200 miles from Booneville. Furthermore, WMAE-DT has no local management or staff present in Booneville on a full-time basis. WMAE-DT does not even have a local telephone number for viewers in its community of license to call with questions, comments or complaints. Clearly, WMAE-DT cannot truly be regarded as a local station under such circumstances. Indeed, but for its power (*i.e.*, 50kW under the STA), WMAE-DT operates much as a television translator station.

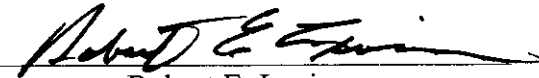
8. By contrast, WTVA is a locally-owned and operated station focusing on the needs and interests of viewers in the Tupelo-Columbus-West Point, Mississippi television market. It has operated in furtherance of the public interest in that market for over 47 years. For more than 40 years, WTVA has been the number one ranked station in the Tupelo-Columbus-West Point, Mississippi television market. By way of contrast WMAE-DT does not attract a large enough following in the Tupelo-Columbus-West Point market to attain even a nominal rating or share during most day-parts of a recent Nielsen survey, and never exceeded a share of two (2). WTVA has served the “needs and interests” of the market by airing among other shows, nearly 30 hours per week of news programming. Of these 30 hours, over 45%, or 13.5 hours are locally produced and originated by WTVA, and concentrate on local events in the Tupelo-Columbus-West Point television market. Had DTV Channel 8 been awarded to WTVA as requested, the station would have been built long ago, instead of lying fallow till now. Thus, instead of the Tupelo-Columbus-West Point television market having an additional DTV signal available, the public interest has been dis-served while this matter has remained unresolved.

IV. Conclusion

9. In view of the foregoing—and in particular—the failure of MAET to inform the Commission of its intentions, if any, to pursue DTV Channel 8 for assignment at Booneville, Mississippi, it is requested that the Commission dismiss as moot, the pending Petition for Rulemaking filed by MAET. Once the Commission's channel election and repacking process commences, the opportunity for WTVA to have Channel 8 allotted to Tupelo for its use, may vanish.

Respectfully submitted,

WTVA, Inc.

By: 
Robert E. Levine
Its Counsel

Dated this _____ day of December, 2004

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Federal Communications Commission
Washington, D.C. 20554

ATTACHMENT A

FEB 17 2004

1800E1-SSA

Mississippi Authority for Educational Television
3825 Ridgewood Road
Jackson, MS 39211

Re: BDSTA-20040204ADG
WMAE-DT
Booneville, MS
Facility ID No. 43170

Gentlemen:

This is in response to your request for special temporary authority (STA) to operate with reduced facilities for Station WMAE-DT. Specifically, you propose to operate with facilities less than those authorized to you in a construction permit or proposed in a pending construction permit application. You have indicated that you will afford the requisite coverage to the city of license with the requested STA facilities.

By virtue of being on the air pursuant to this authority and pursuant to the FCC's action in the Memorandum Opinion and Order on Reconsideration in MM Docket 00-39 (Adopted: November 8, 2001; Released: November 15, 2001), you are now considered to have met the FCC's May 2003 deadline for the completion of construction of your noncommercial educational DTV facilities. In addition, any DTV construction permit issued to you is automatically extended until further notice.

With respect to radio frequency radiation (RFR), we expect compliance with Section 1.1307(b) of the Commission's Rules to be achieved.

After a thorough review of the technical submissions, we are persuaded that no interference is likely to occur from the proposed STA operation. We therefore conclude that the public interest would be served by the grant of this request. If problems do arise, we expect them to be solved expeditiously, and the Bureau reserves the right to require termination of the STA operation without further notice.

Accordingly, the request for special temporary authority to broadcast DTV signals IS GRANTED subject to the following terms and conditions:

SPECIFICATIONS AND CONDITIONS

Station Location: Booneville, MS

Call Sign: WMAE-DT

Station Facility ID No. : 43170

Channel: 55

Antenna Coordinates: 34-40-00
88-45-05

Tower Registration Number: 1041045

Antenna Type: NONDIRECTIONAL, DIE/TLP-24A

Maximum Effective Radiated Power (average): 50 kW

Transmitter: Type Accepted. See Section 73.1660, 73.1665 and 73.1670 of the FCC Rules

Height of radiation center above ground: 111.2 meters

Height of radiation center above mean sea level: 330.7 meters

Height of radiation center above average terrain: 171.2 meters

SPECIAL CONDITIONS


1. The grant of this authority is subject to the condition that, with ample time before commencing operation, you make a good faith effort to identify and notify health care facilities (e.g., hospitals, nursing homes, see 47 CFR 15.242(a)(1)) within your service area potentially affected by your DTV operations. Contact with state and/or local hospital associations and local government health care licensing authorities may prove helpful in this process. During this pre-broadcast period, you must provide all notified entities with relevant technical details of your operation, such as DTV channel, targeted on-air date, effective radiated power, antenna location, and antenna height. You are required to place in the station's public inspection file documentation of the notifications and contacts made and you may not commence operations until good faith efforts have been made to notify affected health care facilities. During this pre-broadcast period and for up to twenty (20) days after commencing operations, should you become aware of any instances of medical devices malfunctioning or that such devices are likely to malfunction due to your DTV operations, you must cooperate with the health care facility so that it is afforded a reasonable opportunity to resolve the interference problem. At such time as all provisions of this condition have been fulfilled, and either upon the expiration of twenty (20) days following commencement of operations or when all known interference problems have been resolved, whichever is later, this condition lapses.

2. The facility authorized herein must comply with the FCC's increased DTV city coverage requirements by the date specified in Section 73.625(a).

3. This authority expires six months from the date of this letter. If appropriate, a timely renewal request must be filed before the end of this period.

4. Hours of operation of this facility will be in accordance with Section 73.624 (b) of the Commissions Rules.

Sincerely,



Clay Pendarvis
Associate Chief
Video Division
Media Bureau

cc: Malcolm G. Stevenson

DECLARATION

I, Frank K. Spain, hereby state as follows:

1. I am President of WTVA, Inc. licensee of Television Station WTVA, Channel 9, Tupelo, Mississippi.
2. Other than certain facts of which official notice can be taken, I am familiar with the content of the foregoing "Petition to Dismiss as Moot," and declare the facts contained therein to be true and correct.

I declare under penalty of perjury, that the foregoing is true and correct.



FRANK K. SPAIN

President
WTVA, Inc.

Dated this 24th day of December, 2004.

CERTIFICATE OF SERVICE

I, Robert E. Levine, hereby certify that I have, on this 29th day of December, 2004, sent by hand-delivery* or First Class United States Mail, postage prepaid, a copy of the foregoing "PETITION TO DISMISS AS MOOT" to the following:

* Robert H. Ratcliffe
Deputy Chief
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*Barbara A. Kreisman
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Robert E. Levine

*Hand-delivery